



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 10 OF 2016

(Before D. K. N. Marete)

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS
AND HOSPITALS WORKERS (KUDHEIHA)CLAIMANT/RESPONDENT**

VERSUS

MANAGEMENT OF TEA HOTEL, KERICHO.....RESPONDENT

AND

JAMES CHIRCHIR.....1ST INTERESTED PARTY

YASANGWAN HOLDING LIMITED.....2ND INTERESTED PARTY

RULING

This is an application by the Interested Parties is dated 14th June, 2018. It comes out as follows;

1. THAT this application be certified urgent and that the same be heard and orders given ex-parte in the first instance.
2. THAT pending inter-partes hearing of this application, there be stay of execution/sale by public auction of land parcel number KERICHO/MUNICIPALITY BLOCK 4/313.
3. THAT pending hearing and determination of this application, there be stay of execution/sale by public auction of land parcel number KERICHO/MUNICIPALITY BLOCK 4/313.
4. THAT the Applicants be granted unconditional leave to appear as interested parties.
5. THAT the warrant of sale and any other orders of execution that were issued to M/s Hegeon Auctioneers in respect to sale by public auction of land parcel KERICHO/MUNICIPALITY BLOCK 4/313 be set aside.
6. THAT Edgar Mutai, Davy Koech and Musa Koech who held out themselves as The Managers of Tea Hotel be ordered to personally meet and pay the Claimant's claim.
7. THAT the Claimant/Respondent and the Respondent be ordered to bear the costs of this application.

It is grounded as follows;

- a. Civil suit number KERICHO HCC NO.4 OF 2015 touching the shareholding of Tea Hotel Limited shall come up for hearing on 2.10.2018.
- b. Land parcel number KERICHO/MUNICIPALITY BLOCK 4/313 is currently registered in the name of Kenya Tourist Development Corporation. The same has been effectively attached by the Court.

c. Tea Hotel Limited has not been sued. Those sued are Edgar Mutai, Davy Koech and Musa Koech who held out themselves as The Managers of Tea Hotel.

d. Interested Parties have brought to Court an application that is of great public interest and therefore if orders sought for are not granted the general public shall suffer great prejudice.

The Interested Parties further support the application in a Replying Affidavit sworn on 3rd July, 2018. This comes as a reply to the claimant's reply to this application.

The claimant/respondent in a Replying Affidavit dated 21st June, 2018 and supported by the Supporting Affidavit of Ruth Ngelechei sworn on even date opposes the application in entirety.

The claimant in his Replying Affidavit which is supported by the Supporting Affidavit of Ruth Ngelechei sworn on 21st June, 2018 brings out a case of the respondents and Interested Parties involvement in the management of the respondent. It is her case that this involvement is so intertwined that this application only comes out as an evasion and denial of lawful responsibility by the Interested Parties. It is escapist and does not reflect the true position of the matter between the workers and the respondent. It must therefore be overthrown.

The respondent in a Replying Affidavit sworn on 21st June, 2018 deems the application an abuse of the process of court and prays that the same be dismissed with costs.

This application came to court variously until 11th July, 2018 when the claimant/respondent in the absence of the other parties sought a determination on the basis of the pleadings filed in court.

The applicants base their application primarily on the ground that M/s Edgar K. Mutai, Davy Koech, Musa Koech, William Kettienya and Kimalel Chumo held themselves to the claimant and the court.

The Interested Parties further submit that they have made a valid objection to the sale of Tea Hotel Limited in redemption of amounts owing to the workers of the respondent, the management of Tea Hotel, Kericho. This is under order 22 rule 51 (1), (2) & (3) of the Civil Procedure Rules, 2010. This is because Tea Hotel Limited is not a party to the claim.

They further submit as follows;

The Interested Parties position is that the consent that was entered on 25.07.2016 and filed in Court on 26.07.2016 alongside the appointment of Mr. Migiro Advocate is purely the decision of Edgar Mutai, Davy Koech, Musa Koech, William Kettienya and Kimalel Chumo who have held out themselves as the Management of Tea Hotel.

This sale is therefore unlawful and unfounded and should not be allowed.

The applicants in the penultimate pose and answer issues as to whether they were involved in the consent dated 25th July, 2016, the subject matter of the ongoing settlement. This is answered in the negative. They further submit that Tea Hotel Limited is not a party to the claim and that they are not asking the court to lift the corporate veil of Tea Hotel Limited.

The Interested Parties in the further affidavit aforesaid rubbish the claimant's case and deposition on the subject in reply. It is their averment that the claimant's submissions on the constitution and ownership of Tea Hotel Limited is distorted and untrue and therefore should not be relied on in this determination. This application therefore becomes sustainable and should be allowed.

The claimant's in their Replying Affidavit aver that Tea Hotel Limited is the property of two sets of directors; Sololo Holdings Limited and Yas Angwan Holdings Limited of which the competing parties, the Management Kericho Tea Hotel and the Interested Parties have occasioned the deathbed of the hotel through endless wrangles.

It is the further submission of the claimant/respondent that at all times, the parties to this application have involved in negotiations with a view to resolving the salient issue of the pending and long standing workers dues. This is the subject matter of this suit and application and should therefore be resolved in favour of the workers.

The claimant/respondent in the penultimate prays that both shareholders of Tea Hotel Limited should instantly formulate a solution to the payment of workers dues failure of which auctioneers be allowed to continue the process of execution.

The respondent in her written submissions rubbishes the application for being unmerited and constructed on denial and mere falsehoods. She opens as follows;

The respondent is a company that was being managed by sololo investments ltd and yasangwan holding ltd the respondent produced to this honourable court the cr12 of Tea Hotel Limited which showed as much. It is the respondent's case that both sololo investments' ltd and the 2nd interested party together with the 1st interested party who is a director to the 2nd interested party are liable to meet the claimants' claim as they were both sued in this suit as Management of Tea Hotel. The suit ELRC No 10 of 2016 reads "management of tea hotel" as the respondent. It therefore means that all that were managing the respondent are liable to meet the claimants' claim. The respondent's case is that both the 1st and 2nd interested parties together with them (respondent) should meet the claimants' claim. A consent was entered where it was agreed on how the respondent would meet the claimants' claim on the 25th July 2016. The said consent did not indicate the names of the respondents' directors who were to meet the claimant's claim but

stated that respondent as a company.

The respondent in furtherance of her case sought to rely on the authority of **Multichoice Kenya Ltd v Mainkam Ltd & Anor. (2013)eKLR** where the court observed as follows;

“I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it. To my mind, there is no doubt that ever since famous case of Salomon v Salomon (1897) A.C. 22 courts have applied the principle of corporate personality strictly. But exceptions to the principle have also been made where it is too flagrantly opposed to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as one entity.”

Further, she enlisted the support of **Halsbury’s Laws of England 4th Edition: 90** as follows;

Notwithstanding the effect of a company’s incorporation, in some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual’s connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced.

It would appear that this application is a camouflage for absconding responsibility by the respondent. The Interested Parties’ case is that this is not a search for lifting the veil of incorporation. I disagree. This is clearly a veiled attempt by the Interested Parties for the court to indulge them as such. It is discernible from the body of the application. However, lifting the veil is not the solution or even an option here. In any event, the parameters for so doing are not met.

We are embroiled in a situation where the respondent’s workers have withstood sufferdom in the form of unpaid salaries and other employment dues for a long time. This resulted in this litigation. Despite a consent order dated 25th July, 2016 and various interventions by the parties and this court to effect payment to the workers, this has not borne fruits. This application seeks to forestall the anguish of the workers on a mere academic exercise. This is, with respect, brutish misadventure. This must be frustrated and refused *in toto*. This application must be relegated to where it belongs. It must fail.

I am therefore inclined to dismiss this application with orders that each party bears their costs of the same.

Delivered, dated and signed this 9th day of October, 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Siele Sigira instructed by Siele Sigira & Company advocates for the Interested Parties.
2. Mr. E.M. Orina instructed by E.M Orina & Company Advocates for the respondent.
3. Mr. Joseph Okwatch for the claimant union.